No. 80-298

In the Supreme Court of the United States

October Term, 1980

ROGER D. MONROE,
Petitioner,

v.

THE STANDARD OIL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT THE STANDARD OIL COMPANY

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QUESTION PRESENTED

Whether the reemployment provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §2021 *et seq.*, require an employer to provide an employee-reservist preferential treatment, not available to other employees, by altering the employer's regular fixed work schedule whenever the employee-reservist has a schedule conflict with any obligation arising by reason of reservist status exists?

RULE 28.1 STATEMENT

The Standard Oil Company ("Sohio") is an Ohio corporation; a majority of its voting stock is owned by The British Petroleum Company Limited. Sohio's subsidiaries and affiliates, other than wholly-owned subsidiaries, and their respective states of incorporation, are as follows: Alyeska Enterprises, Inc. (Alaska); Alyeska Equipment Company (Alaska); Alyeska Pipeline Service Company (Delaware); Algers, Winslow & Western Railway Co. (Indiana); Atlas Supply Company (Delaware); BP Alaska Inc. (Delaware); Colonial Pipeline Company (Delaware); Delaware Bay Transportation Company (Delaware); Inland Corporation (Ohio); Iricon Agency, Limited (Delaware); Laurel Pipe Line Company (Ohio); Miami Valley Corporation (Ohio); Mid-Valley Pipeline Company (Ohio); Paraho Development Corporation (Colorado); Ress Realty Company (Ohio); Sohio/BP Trans Alaska Pipeline Finance, Inc. (Delaware); West Texas Gulf Pipe Line Company (Delaware); White River Shale Oil Corporation (Delaware).

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BRIEF FOR RESPONDENT THE STANDARD OIL COMPANY

This brief is submitted on behalf of respondent The Standard Oil Company (hereinafter "Sohio"). Sohio urges this Court to affirm the judgment of the Sixth Circuit instructing that the complaint in this matter be dismissed.

STATUTORY PROVISIONS INVOLVED

The government's request for relief in this Court is based solely upon 38 U.S.C. §2021(b)(3). Respondent contends that petitioner's claim is governed solely by 38 U.S.C. §2024(d), which provides in pertinent part:

> Any employee . . . who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the

> Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

COUNTERSTATEMENT OF THE CASE

The dispute between the government and Sohio in this proceeding revolves around one central question: What does the law require of an employer when an employee-reservist is unable to observe his regular work schedule because of his military obligations? Sohio contends that 38 U.S.C. §2024(d) spells out the full extent of its legal obligation. An employer must, as Sohio did here, grant a leave of absence for any day on which such a schedule conflict arises and reinstate the employee-reservist upon his next regularly scheduled work shift following expiration of the leave. The government contends, relying solely upon the vague and general 38 U.S.C. §2021

(b) (3), that Sohio must *also* juggle the regular work schedule for the employee-reservist and his fellow employees to avoid such schedule conflicts. In the alternative, the government contends, again relying solely upon §2021(b) (3), that Sohio must pay an absent employee-reservist for regular scheduled work days he does not work due to reserve obligations.

There has been no claim that Roger D. Monroe was subject to discriminatory treatment in any manner by reason of his reservist status or any obligation arising from that status. Monroe has never contended that he suffered any harm in assignments, promotions, rate of pay, or administration of employee benefits by reason of such obligations or status.[1] The record established that he was treated the same as other employees in assignment of work schedules, and that, like other employees within his bargaining unit, he was freely permitted to exchange scheduled shifts with other employees. Pet. App. 11a, 19a. Monroe's claim stems solely from wages lost on the frequent occasions when he was unable to work his regular schedule due to conflicting reserve obligations and was unable to arrange a voluntary exchange of shifts with other employees; thus the district court described its monetary award as "wages lost as a result of serving his military obligation." Pet. App. 26a.

Sohio's Lima Refinery, located in Lima, Ohio, is a 24-hour-per-day, 7-day-per-week continuous process petroleum refining facility (hereinafter "Lima Refinery" or "Re-

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1. Monroe was first employed as a full-time employee of Sohio in June of 1974. During the period reflected by the record, he received 3 promotions even though his reserve obligations frequently interfered with his ability to work his regular schedule: to Liquid Propane Gas ("LPG") Operator in September 1974; to Oil Movement and Storage ("OM&S") Breaker in September 1976; and to Oil Movement and Storage ("OM&S") Operator in November 1976. J.A. 24, 25.

finery"). At the time in question, the workforce at Lima Refinery consisted of approximately 571-574 employees. J.A. 13. This workforce is covered by a collective bargaining agreement between Sohio and Local 7-264, Oil, Chemical and Atomic Workers International Union. J.A. 25.

Monroe was employed, at all times pertinent, within the Pumping Department at Lima Refinery, which is responsible for a wide variety of tasks throughout the facility. The scheduling practices followed in the Pumping Department are subject to the collective bargaining agreement and are typical of those followed throughout the Refinery. A permanent "Master Letter Schedule" covers each of the various regularly scheduled classifications in the Department. Each employee is assigned a letter designation on the schedule. While these designations will change as employees advance with seniority (the letter "A" designating the most senior employee in the classification covered by the schedule), the shift assignments for any particular letter designation are not changed. J.A. 27, 41.

The basic workweek consists of seven days, Monday through Sunday, with three shifts per day. Each employee is scheduled to work five consecutive days each week on a particular shift. An employee's shift will rotate from week to week, *i.e.*, from the first to the second to the third shift on consecutive weeks, then back to the first shift the following week. Each employee's two consecutive days off will also change every fourth week. The net result of this scheduling method is that, over the course of time, an equitable distribution of the burdens of shift and weekend work will be achieved. Each employee letter designation in a particular classification will be assigned approximately the same amount of time on each one of

the three shifts, and will also receive approximately the same number of scheduled weekend assignments. Pet. App. 2a.[2]

On those occasions when the Master Letter Schedule called for Monroe to work on a weekend and he had a reserve obligation for that same weekend, he was first given the opportunity to exchange the conflicting assignment with other employees in accordance with Article V, paragraph 23, of the collective bargaining agreement. J.A. 25. During the period in question, he was able to arrange such a switch on several occasions.[3] When he was unable to do so, the Refinery granted Monroe a leave of absence for the number of days he requested, and instructed him to report for work at his next regularly scheduled shift following expiration of the leave.

The Refinery would then make arrangements to fill the vacancy created by Monroe's absence, either by substituting an employee from the "extra board" or by the call out of another employee in Monroe's classification for overtime work. Frequently, this would involve the payment of overtime wages to the substitute. J.A. 18.[4] These vacancy filling procedures are those required by the collective bargaining agreement for any type of short-term

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2. *See* J.A. 29-39, setting forth portions of the schedule for certain classifications in the Pumping Department. The excerpts from the Master Letter Schedule set forth therein cover the period from the week beginning December 20, 1976, through the week beginning December 26, 1977. The pattern of the Schedule is fixed and permanent, however, and was followed throughout the entire period relevant to this action.

3. It is unclear from the record whether the "four occasions" noted by the lower courts mean four days or four periods of one or more days.

4. Monroe's absences for which such steps were necessary during the period reflected by the record included not only absences resulting from regular monthly training but also 3 consecutive weekends in January 1976 which do not appear to have been "periodic training" sessions.

absence. The Refinery does not fill such vacancies, whatever the cause, by making changes in the Master Letter Schedule. Arrangements by the employee for a voluntary swap, or the granting of a leave of absence and arrangements by the Refinery for filling the vacancy on a temporary basis, are the sole procedure provided in the collective bargaining agreement.

Petitioner's complaint in the district court was based upon both 38 U.S.C. §2021(b)(3) and 38 U.S.C. §2024(d). The court's ruling, however, was based solely on §2021(b)(3). The district court held that Sohio was required to rearrange its Master Letter Schedule, thereby rescheduling all affected employees, to assure that Monroe could work 40 hours in any week in which he had reserve obligations. It expressly based this holding upon the premise that §2021(b)(3) required affirmative action to aid reservists:

> It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations, which while they may be of equal concern to the employee, have no relation to the necessity of the Government to defend itself against enemy aggression. The very existence of the nation depends upon its ability to have a military force trained and skilled in the complex technology of modern warfare. Those who accept the obligation of military service are entitled to more than neutral treatment, or to be treated no differently than those who do not accept this obligation. Pet. App. 24a-25a.

The district court recognized that "complexities and burdens" would arise from requiring Sohio to alter its established scheduling practices at Lima Refinery. Nevertheless, it concluded that "basically this is purely a money issue . . ." since it asserted that Sohio could always choose

the alternative of paying the employee-reservist for time not worked should this turn out to be less expensive. Pet. App. 25a.

The court of appeals reversed. First, it determined that Sohio's accommodation of Monroe's absences met the requirements of §2024(d):

> Section 2024(d) creates special rights for reservists. It compels employers to grant leaves of absence to employees who must attend reserve training. In addition, Section 2024(d) entitles a reservist who has been absent for inactive reserve training to benefits upon his return, such as wage rates and seniority, "which automatically would have accrued to him if he had remained in the continuous service of his employer." *Aielio v. Detroit Free Press, Inc.*, 570 F.2d 145, 148 (6th Cir. 1978). It does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. *Id.* at 145. *See also, Foster v. Dravo Corp.*, 420 U.S. 92 (1975). Thus, it is clear that section 2024(d) does not require employers to pay absent reservists for hours not worked.[5] Pet. App. 8a.

Second, the court of appeals rejected the district court's interpretation of §2021(b)(3); it held that "section 2021(b)(3) merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations." Pet. App. 11a. It concluded that Sohio had taken no discriminatory action of the type proscribed by §2021(b)(3):

> The requirement of equal treatment was met in the present case. The parties agreed that appellee was

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5. The government's petition for certiorari and brief on the merits do not challenge the interpretation and application of §2024(d) by the court of appeals.

regularly scheduled for forty-hour workweeks, as were his fellow employees. Further, Monroe was scheduled for weekend work in accordance with Sohio's established practice of rotating shifts to insure that all employees would work approximately an equal number of weekend days. Finally, he was treated the same as his coworkers with regard to the right to exchange shifts with other employees. Pet. App. 11a.

Having concluded that Monroe was not entitled to relief under either statutory provision, the court of appeals instructed that the complaint in this matter be dismissed. Pet. App. 13a, 14a.

SUMMARY OF ARGUMENT

Although the veterans' reemployment statute has been before this Court on several prior occasions, this is the first case in which this Court has been called upon to consider those provisions of the statute specifically enacted and designed for military reservists.

Ever since the concept of a part-time military was first introduced, the problem of resolving conflicts between reserve obligations and regular employment schedules has existed. Congress first acted to spell out an employer's obligations in this regard in 1951. Because of ambiguities and uncertainties in the initial legislation, particularly with regard to weekend training obligations, Congress addressed this question again in 1960 in very specific and explicit terms.

Congress's instructions on how to resolve such conflicts were spelled out in what is now 38 U.S.C. §2024(d). This statutory provision requires that a leave of absence be granted to the absent employee-reservist; that the em-

ployee-reservist report back for work at his "next regularly scheduled working period" following the leave; and that, if he does so, his position be made available by the employer with "seniority, status, pay and vacation" preserved.

This provision of the statute survives intact 20 years later. There has never been any suggestion by Congress or by federal agencies responsible for administering the veterans' reemployment statute that this provision is inadequate to its task. There is no dispute that Sohio fully complied with the requirements of §2024(d) in its treatment of Roger D. Monroe's absences.

The government's argument, and the district court's decision, are based upon two fallacies. First, they apply another statutory provision, 38 U.S.C. §2021(b)(3), initially adopted in 1968, to a problem it was never intended to address. Section 2021(b)(3) was adopted for the significant but limited purpose of providing the employee-reservist with statutory protection against discharge, demotion, or other discrimination motivated by reservist status. Congress's sole intent was to provide protection comparable to the protection against "discharge without cause" already existing for the regular military. Congress had no intention of meddling with the detailed solution it had developed eight years earlier for routine problems associated with recurring schedule conflicts.

Second, the government can justify relief under §2021(b)(3), assuming *arguendo* that it has some application, only by reading it as an affirmative action measure that requires preferential treatment for employee-reservists. Such claims for preferential treatment on behalf of the regular military have consistently been rejected by this Court. There is no basis, either in the language of the statute or in its legislative history, to support such a creation of rights for reservists that exceed those available

to the regular military. The isolated (and subsequently deleted) passage from early Congressional deliberations upon which the government relies falls far short of the convincing demonstration of Congressional intent this Court requires before imposing an affirmative action requirement.

Granting the relief sought by the government in this case would lead to several anomalous results. This Court has consistently held that the various provisions of the veterans' reemployment statute do not protect against lost compensation for the actual performance of work, as opposed to the denial of employment benefits which are a reward for length of service. Yet "wages lost as a result of serving his military obligation" are precisely what petitioner has sought in this proceeding. Moreover, the relief requested would alter the scheduling practices and the procedure for accommodating schedule conflicts established by the applicable collective bargaining agreement. Such a result cannot be reconciled with this Court's ruling in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), held that an employer is not required to alter scheduling practices existing under a collective bargaining agreement to accommodate an employee's religious objections to weekend work. *Hardison* reflects a reluctance to interfere with regular scheduling practices which applies with equal force to this proceeding, in view of the express sanction of regular work schedules by §2024(d).

What the government seeks is, in effect, a new and significant statutory right to any preferential treatment necessary to preserve an employee-reservist's regular work schedule and compensation intact. The statutory provision upon which it relies, §2021(b)(3), extends to "any obligation as a member of a reserve component of the armed forces." There is no basis in the statute or its legislative

history to limit the principles espoused by the government to one weekend per month and not apply them to 2-week summer camps or to unscheduled callouts whatever their cause or duration.

The result would be a new and significant burden upon public and private employers that was never contemplated by Congress. There is no need for such additional statutory protection; the existing protections are substantial. Section 2021(b)(3), properly interpreted, protects the employee-reservist against discriminatory treatment. Section 2024(d) provides specific and understandable instructions on how to resolve schedule conflicts and associated claims for pay or benefits. There is no indication that Congress saw it necessary or appropriate to supplement these protections with a far-reaching affirmative action requirement.

The proper method to create such a significant new right would be to approach Congress for further protective legislation. There is no showing in this record, or the government's brief, that any need for such additional, unprecedented protection exists.

ARGUMENT

I. SOHIO HAS MET THE STATUTE'S REQUIREMENTS THAT IT GRANT A LEAVE OF ABSENCE WHEN A SCHEDULE CONFLICT ARISES AND THAT IT REFRAIN FROM ADVERSE ACTION DIRECTED AT EMPLOYEE-RESERVISTS.

A. Section 2024(d) Grants the Right to a Leave of Absence and Reinstatement Whenever Schedule Conflicts Arise.

The first provisions of the statute providing reemployment rights in the nature of leaves of absence for persons

performing military training duty were enacted in 1951 as part of the Universal Military Training and Service Act. Pub. L. 82-51, 65 Stat. 75 (1951). Because of ambiguities in these initial provisions, particularly as they applied to Reserve or National Guard short-term training requirements, Congress addressed this subject again in the 85th and 86th Congresses (1957-60), ultimately enacting clarifying provisions which are today embodied in §2024(d).[6] As the report of the Senate Committee on Armed Services noted:

> This section was designed to provide reemployment protection for trainees who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, special training or instruction periods that may last for 30, 60 or 90 days. S. Rep. No. 1672, 86th Cong., 2d Sess. 2 (1960).

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6. The bill which contained what became 38 U.S.C. §2024(d) was first introduced in the 85th Congress. H.R. 8522, 85th Cong., 1st Sess. (1957). That bill was favorably reported by the full House Committee on Armed Services on July 24, 1957, H.R. Rep. No. 867, 85th Cong., 1st Sess. (1957), and was passed by the House on August 5, 1957. 103 Cong. Rec. 13622 (1957). The bill was referred to the Senate Committee on Armed Services on August 6, 1957, 103 Cong. Rec. 13723 (1957). The bill was reported by the Senate Committee with an amendment on July 28, 1958. S. Rep. No. 2030, 85th Cong., 2d Sess. (1958). The bill as amended by the Committee was passed by the Senate on August 4, 1958. 104 Cong. Rec. 15963 (1958). The bill died in a conference committee in the 85th Congress.

The bill was reintroduced in the 86th Congress. H.R. 5040, 86th Cong., 2d Sess. (1960). It was favorably reported by the House Committee on February 11, 1960, H.R. Rep. No. 1263, 86th Cong., 2d Sess. (1960), and passed the House on March 7, 1960, 106 Cong. Rec. 4749 (1960). It was referred to the Senate Committee and was reported with an amendment on June 23, 1960. S. Rep. No. 1672, 86th Cong., 2d Sess. (1960). The bill was amended and passed the Senate on June 28, 1960. 106 Cong. Rec. 14681 (1960). The House concurred in the Senate amendment. 106 Cong. Rec. 15007 (1960). The legislation was signed into law on July 12, 1960. Pub. L. 86-632, 74 Stat. 467 (1960).

As enacted in 1960, and still in effect today, §2024(d) requires, first, that the employer grant the employee-reservist a leave of absence for the period of time necessary for training. Second, the employee-reservist's position must be held open by the employer, and upon his return the employee-reservist must be reinstated with "seniority, status, pay and vacation" as if he had not been absent.

Congress paid particular attention to spelling out when and how these reinstatement rights must be exercised. Previously, a 30-day period had been provided for assertion of such rights; as the Department of Labor suggested in supporting the bill which became §2024(d):

> We believe that it would be more realistic, because of the relatively short absence from work in this instance, to shorten the length of the period for application for reinstatement. H.R. 5040 would achieve this result by requiring that application for reinstatement be made at the beginning of the next regularly scheduled working period or within a reasonable time after expiration of the necessary travel time to the place of employment following rejection or release. S. Rep. No. 1672 at 5; H.R. Rep. No. 1263, 86th Cong., 2d Sess. 4 (1960).

This suggestion was adopted by Congress. The employee-reservist is thus required to report for work "at the beginning of the next regularly scheduled working period" when he can reasonably arrive after completion of the training. Section 2024(d) specifically provides that failure of an employee to so report in accordance with his regular work schedule shall make him "subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

The reinstatement rights granted by this section are similar to those provided elsewhere in the statute for regular military personnel.[7] There is no indication in the statute or the legislative history that an employer is under any obligation to pay the absent employee-reservist or to rearrange his regular work schedule to make up for lost work time. Indeed, the specific reference to reinstatement at a "regularly scheduled working period" suggests just the opposite.

B. Section 2021(b)(3) Precludes Adverse Action Against an Employee-Reservist and Is Not Addressed to Routine Schedule Conflicts.

For regular military personnel, this Court has long recognized that the veterans' reemployment statute contains two quite separate and distinct provisions. First, the returning veteran is entitled to reinstatement with his "seniority, status and pay" intact. 38 U.S.C. §2021(a). The extent of this protection, most particularly how an employee's appropriate status and seniority should be determined in light of intervening developments, has been the subject of most of the litigation in this Court concerning the veterans' reemployment statute. *See Alabama Power Co. v. Davis,* 431 U.S. 581 (1977) (discussing the principal cases).

Second, the returning veteran is given special ancillary protection, for a limited period, against discharge without cause or other adverse employment action that would frustrate the reinstatement protection already provided.

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7. There was only one special protection granted to employee-reservists not provided for regular military personnel. The Senate Committee on Armed Services added a provision which would specifically require that reservists not be charged for vacation time because of any training-related absence, S. Rep. No. 1672 at 3; this was incorporated in the bill as enacted.

See 38 U.S.C. §2021(b)(2). As this Court has noted, Congress "added special statutory protection, for one year, against certain types of discharges or demotions that might rob the veteran's reemployment of its substance." *Oakley v. Louisville & Nashville Railroad Co.*, 338 U.S. 278, 285 (1949).

That these two protections are separate and distinct has been recognized by this Court from the first. The first case before this Court interpreting the veterans' reemployment statute, *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275 (1946), specifically distinguished the two, and this distinction has been clarified in subsequent Court decisions. *See Oakley*; *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947).

In 1960, when Congress enacted the provision which is now codified as §2024(d), it took no action to provide reservists with similar complementary protection against discharges, demotions, or comparable discriminatory conduct. Thus while the employee-reservist had specific reinstatement rights, he had no protection against employer discrimination once those rights had been exercised. The legislative history of §2021(b)(3) indicates that the specific intent of its sponsors and advocates was to fill this gap.[8]

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8. The bill which included what became 38 U.S.C. §2021(b)(3) was first introduced in the 89th Congress. H.R. 11509, 89th Cong., 2d Sess. (1966). Hearings were held before Subcommittee No. 3 of the House Committee on Armed Services in February 1966. *Hearings on H.R. 11509 Before Subcomm. No. 3 of the House Comm. on Armed Services*, 89th Cong., 2d Sess. (1966) [hereinafter cited as *House Hearings - 1966*]. The bill was favorably reported by the full Committee, H.R. Rep. No. 1303, 89th Cong., 2d Sess. (1966), and was passed by the House on March 7, 1966, 112 Cong. Rec. 5016 (1966). No action was taken on the measure by the Senate in the 89th Congress, however.

(Continued on following page)

When the bill was first considered by the House Committee on Armed Services in 1966, the chief Administration spokesman was Hugh W. Bradley, then Chief of the Bureau of Reemployment Rights, U.S. Department of Labor. Bradley described the relevant portions of the bill as follows:

> The first provision of the bill deals with a problem that has been increasingly difficult in the past few years. It is designed to enable reservists and guardsmen, who leave their jobs to perform training in the armed services, to retain their employment and to enjoy all of the employment opportunities and benefits accorded their coworkers who do not have military training obligations. The law does not now protect them against discharge without cause as it does with inductees and enlistees who have one year protection

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Footnote continued—

The bill was reintroduced in the 90th Congress. H.R. 1093, 90th Cong., 1st Sess. (1967); S. 2561, 90th Cong., 1st Sess. (1967). Hearings were again held before Subcommittee No. 3 of the House Committee, on March 20, 1968. *Hearings on H.R. 1093 Before Subcomm. No. 3 of the House Comm. on Armed Services*, 90th Cong., 2d Sess. (1968) [hereinafter cited as *House Hearing - 1968*]. The bill was favorably reported by the full Committee on April 24, 1968, H.R. Rep. No. 1303, 90th Cong., 2d Sess. (1968), and initially passed by the House on May 6, 1968, 114 Cong. Rec. 11779 (1968). Hearings were held by the Senate Committee on Armed Services on July 25, 1968. *Hearings on H.R. 1093 Before Senate Comm. on Armed Services*, 90th Cong., 2d Sess. (1968) [hereinafter cited as *Senate Hearings - 1968*]. The bill was favorably reported by the Committee, S. Rep. No. 1477, 90th Cong., 2d Sess. (1968), on July 26, 1968, with certain amendments not germane here, and passed the Senate on July 29, 1968, 114 Cong. Rec. 24017 (1968). The House concurred in the Senate amendment and made a technical amendment. 114 Cong. Rec. 24373 (1968). The Senate concurred in the House amendment. 114 Cong. Rec. 24999 (1968). The bill was signed into law on August 17, 1968. Pub. L. 90-491, 82 Stat. 790 (1968).

The language of that portion of the bill which became §2021(b)(3) was unchanged throughout its legislative consideration. There was no substantive discussion of the measure on the floor of either chamber. Accordingly, the key portions of the legislative history are the three hearings held on the proposed measure and the three committee reports.

and initial active duty for training reservists who have six months protection.

To give the reservist a specific period of protection after each tour of training duty would be to perpetuate him in his position indefinitely. The new section 9(c)(3), which the proposed amendments would add to the act, would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a Reserve component of the Armed Forces. *House Hearings - 1966* at 5312.

Testimony by Rear Admiral Burton H. Shupper, U.S.N., was in a similar vein:

The other aspect of H.R. 11509 is the provision that employees should not be denied retention in employment or advantages of employment because of any obligation of a member of a Reserve component of the Armed Forces. After the Berlin and Cuba callups, we received information from our Reserve community that a significant number of reservists were receiving indications that opportunities for advancement and retention in civilian employment would favor those who appear to offer their employers more continuity of services, namely those in the standby reserve or those with no reserve status. In fairness, we must emphasize that this reaction on the part of employers appears to be the exception not the rule, and, we believe, is generally not based upon unpatriotic motives but rather on the competitive spirit of business. *House Hearings - 1966* at 5315.

Subsequent colloquy between the subcommittee and the witnesses likewise identified the key problem addressed

by the proposed legislation as discharges, demotions or similar adverse treatment in employment that discriminated against reservists. *See House Hearings - 1966* at 5316 (comments of Congressman Hall); *House Hearings - 1966* at 5319-20 (comments of Subcommittee Counsel Slatinshek).

The House Committee's subsequent report made it clear that its principal purpose was to preclude discharges and other discrimination that denied employment opportunities to reservists. The bill was described as providing "job protection for employees with obligations as members of a reserve component." H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966). The Committee specifically noted that "the only substantive changes in existing law relate to . . . the prohibition against employer discrimination against reservists who participate in the Reserve or National Guard programs." *Id.* at 4.

Hugh Bradley was again the principal spokesman for the Administration in the two hearings held in the 90th Congress. His testimony was substantially the same as two years earlier (with one notable omission—*see* pp. 29-30 *infra*). The only private sector comment on the legislation was from the American Legion, which submitted the following statement for the record:

> The American Legion feels very strongly that employees with reserve obligations who are members of the National Guard and the Reserves should not be denied retention in employment or promotional opportunities solely because of their participation in the Reserve Training Program. They should be afforded all the employment opportunities and benefits as those who do not have training obligations. The Reemployment Rights Statutes do not now protect National Guard members and Reservists as it does inductees and en-

listees, who have one year protection, and initial active duty for training reservists who have six months protection.

H.R. 1093 would add a new section, 9(c)(3) under the reemployment provisions of the Universal Military Training and Service Act, which would prevent discharge from employment without cause because of membership in the National Guard or Reserves *and would also prevent discrimination in such areas as promotion, training opportunities and pay increases. House Hearings - 1968* at 7477 (emphasis added).

Both the Senate and the House Committee Reports in the 90th Congress reiterate the limited purpose of the additions to the statute. The House Committee noted that:

Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [sic] soley [sic] because of such Reserve affiliation.

It assures that these reservists will be entitled to the same treatment afforded their coworkers without military obligation. H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968).

The Senate Committee described its motivation as follows:

Employment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and others have been discharged because of these obligations. Section 1 of the bill is intended to protect members of the Reserve components of the Armed

Forces from such practices. S. Rep. No. 1477, 90th Cong., 2d Sess. 2 (1968).

This legislative history paints an unambiguous picture of the purpose of this legislation: to give employee-reservists statutory protection against discharge and discrimination in employment comparable to the statutory protection already provided for the regular military. There is no indication that Congress intended to tamper with or expand the very specific solution for resolving the routine problem of schedule conflicts which it had adopted just eight years earlier.

The government's suggestion that the vague and general language of §2021(b)(3) was considered "necessary specifically to deal with disadvantages in a reservist's daily worklife caused by these absences, against which the traditional reemployment rights provisions offer inadequate protection," Brief for Respondent at 13, is fashioned out of whole cloth. It ignores this Court's repeated holding that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (citing *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). If this were Congress's purpose, would one not expect some discussion of the inadequacies of traditional provisions, *i.e.*, of §2024(d), in the legislative history? Would one not expect some review of a panoply of "daily worklife" disadvantages suffered by reservists in spite of the existing protections? None of this exists. On the contrary, the consistent focus of the Administration which proposed §2021(b)(3) and the Congresses which considered it was upon one particular set of adverse consequences that potentially flow from an employee's "obligation as a Reservist": the temptation of employers (because of "the competitive spirit of business") to discharge, deny promo-

tions to, transfer to less favorable assignments or other wise discriminate against the employee-reservist.

C. The Consistent Administrative Interpretation of the Act Requires Only That an Unpaid Leave of Absence Be Granted When a Schedule Conflict Exists.

The Office of Veteran Reemployment Rights within the Department of Labor is generally responsible for assisting persons protected by the Act in pursuing their statutory rights; its role in the administration of the Act has been recognized by Congress. *See* 38 U.S.C. §2025. For several years, the Office and its predecessors have followed the practice of issuing Handbooks and Field Letters for the purpose of advising veterans of their rights under the veterans' reemployment statute. Relevant excerpts from these materials are set forth in Addendum A. They demonstrate that the consistent position of the Office from shortly after the passage of §2021(b)(3) to the current day is that an employer's only obligation in the face of an employee-reservist's schedule conflict is to provide an unpaid leave of absence and to reinstate the employee-reservist when he is again able to report for duty.

For example, in the *Veterans' Reemployment Rights Handbook* issued in 1970, and still in use today, the Office specifically notes that "the law does not require the employer to pay the employee for the time he is absent for military training or even to make up the difference between his military pay and his regular earnings for that period." U.S. Department of Labor, Labor-Management Services Administration, Office of Veterans Reemployment Rights, *Veterans' Reemployment Rights Handbook* 113 (1970).

Similarly, it notes that "the intent of [§2021(b)(3)] is to prohibit any kind of discrimination by the employer against an already employed reservist or guardsman which is motivated by his membership in the reserves or guard or by any consequences of such membership." *Id.* at 115. The examples provided in the Handbook support these interpretations. Of particular interest is the example involving "Maintenance Man M", set forth in full in Addendum A. This example involves a conflict between weekend training duty and a weekend work schedule. The Handbook notes that "under the August 17, 1968, amendments W company must grant M the promotion he clearly would have had but for his reserve obligation, *and solve its Saturday staffing problem in some other way.*" *Id.* at 119 (emphasis added). Nowhere is there any mention of an obligation to reschedule as a result of such a schedule conflict.

Similar examples are carried forward in Field Letters subsequently issued by the Office: Field Letter 23, issued in 1975, and Field Letter 24, issued in 1978. The Field Letters are similarly devoid of any suggestion that an employer has an obligation to adjust the employee-reservist's schedule.

These interpretations of the Act, although not binding on this Court, are entitled to considerable weight. As this Court has previously noted in *Udall v. Talman,* 380 U.S. 1, 16 (1965), "this court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *See also United Air Lines, Inc. v. McMann,* 434 U.S. 192, 197 n. 4 (1977). Such deference is particularly appropriate here, since the office that has developed and is applying these interpretations is the very same office within the federal government which served as the principal advocate and spokesman

for the legislation which became §2021(b)(3) in the first place, and its first enunciation of its interpretation came shortly after the legislation was passed.

D. Sohio Handled Monroe and His Schedule Conflicts Properly.

There is no dispute that Sohio has complied with all relevant requirements of §2024(d). Whenever a conflict existed between Monroe's reserve schedule and a weekend shift assignment, and no voluntary swap was arranged by Monroe for the week in question, he was granted a leave of absence for the required period of time. There has been no attempt to persuade this Court that, upon his return and reinstatement, his rights to "status, seniority, pay or vacation" were infringed in any way.

Similarly, Sohio took no action discriminating against or adverse to Monroe because of his reserve obligation. Indeed, he received several promotions in the period reflected by the record, despite the frequent absences for reserve duty which interfered with his regular work schedule. He was given the same treatment as all other employees in establishing work schedules and his rights under the collective bargaining agreement to exchange shift assignments were not impeded in any way. Monroe, in short, has suffered no adverse consequences proscribed by §2021(b)(3) as a result of his reserve obligations and thus has no valid claim for relief based upon §2021(b)(3).

II. SECTION 2021(b)(3) IS A NON-DISCRIMINATION MEASURE ONLY AND DOES NOT REQUIRE PREFERENTIAL TREATMENT FOR EMPLOYEE-RESERVISTS.

A. This Court Has Consistently Rejected Claims for Preferential Treatment Under the Veterans' Reemployment Statute.

This Court has consistently rejected the notion that the remedial provisions of the veterans' reemployment statute require preferential treatment for the individuals they protect. For example, in *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275 (1946), the seminal case interpreting this statute, this Court rejected a veteran's claim for preferential treatment. The veteran in *Fishgold* claimed that the applicable provisions of the veterans' reemployment statute granted him, after his return to work, a preferred status vis-a-vis his non-veteran fellow employees under the seniority-based layoff provisions of the applicable collective bargaining agreement. In rejecting this claim, the Court noted:

> [N]o step up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more. 328 U.S. at 286.

The Court went on to note:

> There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was give the veteran protection within the framework of the seniority system plus a guaran-

> tee against demotion or termination of the employment relationship without cause for a year.
>
> . . . .
>
> . . . We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was a right to work when by operation of the seniority system there was none then available for him. 328 U.S. at 288-289.

The Court reaffirmed this interpretation of the Act the next year in *Trailmobile Co. v. Whirls,* 331 U.S. 40 (1947), in rejecting a similar claim that the statute provided a veteran with a preferred status of indefinite duration, as against his fellow employees:

> We do not think Congress had in mind such far-reaching consequences for the nationwide system of employment, both public and private, when making the statutory provisions for the veteran's benefit.
>
> . . . .
>
> . . . But if this extraordinary statutory security were to be extended beyond the statutory year the restored veteran would acquire not simply equality with non-veteran employees having identical status as of the time he returned to work, he would acquire indefinite statutory priority over non-veteran employees, a preferred status which we think not only inharmonious with the *Fishgold* rationalization but beyond the protection contemplated by Congress. 331 U.S. at 57-59.

In fact, in the entire history of this Court's interpretation of the various provisions of the veterans' reemployment statute, there is not a single instance in which a reemployed veteran, solely by reason of his protected status under the Act, has been granted a preference over his fellow employees who had continuously been at work and

actively employed. Protected veterans have gained advantage over their fellow employees only where their accumulated seniority, calculated and applied under the "escalator principle" established by this Court, gives them greater seniority under the provisions of the applicable collective bargaining agreement.[9] *See, e.g., Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964); *Barrett v. Grand Trunk Western Railroad Co.*, 581 F.2d 132 (7th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979). The nature of the protection accorded the veteran was aptly described by this Court in *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 525-26 (1949):

> It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static. They are not frozen even by war. Thus, under the Act the veteran accumulates time toward his seniority while in the service; he also becomes the beneficiary of those gains the achievement of which is the constant thrust of collective bargaining. In other words, the Act gives him the status of one who has been "on furlough or leave of absence" but uninterruptedly a member of the working force on whose behalf successive collective agreements are made. In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is "on furlough", but he is not to be favored

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9. The government asserts that the statutory rights of veterans may on occasion result in their enjoying employment benefits superior to those available to employees on leave of absence from work for other reasons. Brief for Petitioner at 18-19 (citing *Coffy v. Republic Steel Corp.*, 100 S. Ct. 2100 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581, 591 (1977)). That is of little relevance to this case, however, since petitioner herein seeks work assignment preferences not available to any employee at the Refinery, whether active or on leave of absence.

as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275.

The court of appeals applied this traditional caution to claims for preferential treatment for veterans, rejecting the conclusion "that section 2021(b)(3) imposes upon an employer the affirmative duty to accommodate employees with military reserve obligations by bestowing upon them rights and privileges not generally accorded their fellow employees." Pet. App. 8a. Such caution is fully appropriate in construing §2021(b)(3), since it applies to "any obligation as a member of a Reserve component of the Armed Forces." The statute is not limited by frequency or duration of occurrence or by the cause of any particular obligation. Section 2021(b)(3) has already been applied by the lower courts to such reserve obligations as two-week summer camps, *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 913 (1980); six-week training sessions, *Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024 (1st Cir. 1979), *cert. denied*, 446 U.S. 913 (1980); and two-month training sessions, *Peel v. Florida Department of Transportation*, 443 F. Supp. 451 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (5th Cir. 1979). A ruling that any and all such obligations gave rise to a claim for preferential treatment—or, in its stead, a claim for compensation—would be a new, significant and unwise expansion of the statute.[10]

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10. This Court has noted, in another context, that preference for veterans in employment "may reflect unwise policy," since such preferences benefit "an overwhelmingly male class," *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 269, 281 (1979).

B. The Language and Legislative History of Section 2021(b)(3) Indicate It Was Enacted As a Prohibition Against Discrimination, Not As an Affirmative Action Measure.

There is nothing in the language of §2021(b)(3) itself that suggests an affirmative action requirement. Indeed, the language of the statute, cast as it is in the double negative, "any person . . . shall not be denied," suggests just the opposite, *i.e.*, that it is a ban on adverse treatment.

Furthermore, the section makes no distinction among the various types of employment actions to which it applies; and one would expect similar treatment was intended for each. These listed actions are:

> "retention in employment", *i.e.*, layoff, termination or discharge;
>
> "any promotion", *i.e.*, promotion or advancement;
>
> "or other incident or advantage of employment", *i.e.*, other employment opportunities, comparable to promotions or advancements (*e.g.*, training).

There is, of course, no suggestion in the government's brief that this section requires that employee-reservists be granted preferred status in layoff situations or preferred access to promotional oppcrtunities. How, then, can the language of this section be read to provide preferred access to any "other incident or advantage of employment"?

The intent to enact a non-discrimination measure is confirmed by the legislative history reviewed earlier in this brief. The focus of Congressional consideration was on problems of discrimination against employee-reservists and adverse treatment by reason of their obligations as reservists. There is no suggestion in the Congressional hearings or reports that any affirmative action or preferential treatment was required.

The government's argument is principally based upon one isolated passage from the legislative history:

> If these young men are essential to our defense, then certainly our government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible. H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966).

See Brief for Respondent at 14, 15. *See also Carney v. Cummins Engine Co.*, 602 F.2d 763, 765 (7th Cir. 1979), *cert. denied*, 444 U.S. 913 (1980) (citing, in error, the House and Senate Reports from the 90th Congress). This isolated statement is of little weight. It appears only in the House Report from the 89th Congress; it is not contained in either the House or the Senate Report that accompanied the bill as finally enacted in the 90th Congress. *Compare* H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966) *with* H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3, 8 (1968) *and* S. Rep. No. 1477, 90th Cong., 2d Sess. 3 (1968). Moreover, the language of the very same House Report from the 89th Congress specifically indicates that a non-discrimination measure was intended: "[I]t should be noted that the only substantive changes in existing law relate to . . . the prohibition against employer discrimination against reservists who participate in the reserve or National Guard programs." H.R. Rep. No. 1303, 89th Cong., 2d Sess. 4 (1966). It appears tnat the passage relied upon by the government was lifted verbatim from the hearing statement of Hugh W. Bradley before the House Committee in 1966. *See House Hearings - 1966* at 5313. This passage disappears from Bradley's presentation to both the House and Senate in the subsequent Congress. *See House Hearings - 1968* at 7471, 7472; *Senate Hearings - 1968* at 2, 3. In all three Congressional appearances, it was the clear weight of Bradley's testimony that the purpose of this provision

was limited to providing protection against discharge without cause and comparable adverse treatment. An isolated passage which both the chief spokesman for the bill and the relevant Congressional committes rejected as a rhetorical flourish is a very slender reed upon which to build an affirmative action requirement.

The government also attempts to read some special meaning into the use of the word "obligation", arguing that it connotes some manner of affirmative action purpose. Brief for Petitioner at 12. But this argument takes the word "obligation" out of context; the relevant language in §2021(b)(3) is *"because of any obligation* as a member of a Reserve component of the Armed Forces." (emphasis added). Mr. Bradley's testimony indicated that this language was chosen to focus upon the motivation for the employer action in question, in order to parallel the existing statutory protection against "discharge without cause" for the regular military. *House Hearings - 1968* at 7471; *Senate Hearings - 1968* at 2. The court below correctly rejected the government's argument and read the language utilized in §2021(b)(3) to mean that employee-reservists "must not be subjected to on-the-job bias by their employers because of their prospective military obligations." Pet. App. 11a; *accord, Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024, 1027 (1st Cir. 1979), *cert. denied*, 446 U.S. 913 (1980).

C. This Court Requires More Specific Legislative Authorization to Impose an Affirmative Action Requirement.

This Court, construing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, recently refused to approve federal agency regulations attempting to read an affirmative action requirement into that statute since there

was no indication in the statute or legislative history that this was Congress's intent:

> Section 504 does not refer at all to affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.[11] *Southeastern Community College v. Davis*, 99 S. Ct. 2361, 2369 (1979).

The reasoning of that decision applies with equal force to the interpretation of §2021(b)(3). The court determined Congress's intent in enacting Section 504 of the Rehabilitation Act by contrasting it with another provision of the same statute which adopted express affirmative action requirements binding upon certain private employers. *See* Rehabilitation Act of 1973 §503, 29 U.S.C. §793. Congress has also demonstrated, in the veterans' reemployment statute, that it has the same ability to recognize where affirmative action is needed and to expressly provide for it. Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93-508, 88 Stat. 1594 (1974), made specific revisions to existing terms of the statute to enact an express affirmative action requirement for certain disabled veterans of the Vietnam era, now embodied in 38 U.S.C. §2012. This affirmative action requirement for Vietnam era veterans was expressly modeled after the similar language and intended scope of Section 503 of the Rehabilitation Act. *See* S. Rep.

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11. The provisions of Section 504 of the Rehabilitation Act of 1973 are again before this Court at the present time. *See Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3332 (1980) (No. 80-317).

No. 1107, 93d Cong., 2d Sess. 34 (1974). It is noteworthy that the very same enactment which made these changes calling for affirmative action also recodified, in Section 404, much of what already existed in the veterans' reemployment rights statute into its current statutory position in Title 38 of the United States Code without making any substantive changes. *See Coffy v. Republic Steel Corp.*, 110 S. Ct. 2100, 2103 n. 2 (1980).

D. The Non-Discrimination Requirements of Section 2021(b)(3) Are a Vital and Significant Part of the Statutory Scheme.

The government denigrates the significance of the non-discrimination implications of §2021(b)(3), commenting that "there is no reason to believe that Congress felt it necessary to add a special subsection to deal with such a limited problem." Brief for Petitioner at 12. This statement does no justice to the significant and substantial impact of the non-discrimination requirements of §2021(b)(3).

Certainly the Congresses which considered the legislation which became §2021(b)(3) saw a need to protect employee-reservists from discriminatory conduct by their employers. The legislative history reviewed earlier in this brief cites examples of discriminatory terminations and denials of promotional opportunities that, while perhaps not widespread, were a source of significant concern. Similarly, this Court has noted that the comparable protections existing for the regular military are necessary if the reinstatement rights are to have any substance: "[I]t is therefore clear that Congress did not confer the rights given as incidents of the restoration simply to leave the employer free to nullify them at will, once he had made it." *Trailmobile Co. v. Whirls*, 331 U.S. at 57.

Court decisions under §2021(b)(3) reflect that, while still perhaps not widespread, discriminatory employer prac-

tices continue. Two of the cases relied upon by the government involve instances of such discrimination: *Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024 (1st Cir. 1979), *cert. denied*, 446 U.S. 913 (1980) (transfer to less desirable assignment because of schedule conflicts); *Peel v. Florida Department of Transportation*, 443 F. Supp. 451 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (5th Cir. 1979) (discharge because of schedule conflicts). *See also Bankston v. Stratton-Baldwin Co., Inc.*, 441 F. Supp. 247 (S.D. Ala. 1977) (discharge because of military-related absences).

The non-discrimination requirements of §2021(b)(3) do in fact have substantial impact upon employers. The frequent absences from work experienced by employee-reservists can have a significant impact upon their productivity and can cause considerable inconvenience to employers who must find alternate means for getting the job done. Yet Congress has dictated, in §2024(d), that the absences must be accommodated and, in §2021(b)(3), that employers cannot avoid their obligations by ridding themselves of employee-reservists either by direct action or by "squeezing them out the door."

III. THE PREFERENTIAL TREATMENT SOUGHT CONFLICTS WITH THIS COURT'S RULINGS ON WORK REQUIREMENTS AND ON DEFERENCE TO COLLECTIVELY BARGAINED SCHEDULE ASSIGNMENT AND ADJUSTMENT PRACTICES.

A. A Veteran's Reemployment Rights Do Not Include Compensation for Working Time Lost.

One consistent principle emerging from this Court's decisions is that the "seniority, status and pay" protected

upon a veteran's reinstatement do not include employment rights and benefits which are in reality compensation for the actual performance of work as opposed to a reward for length of service. For example, in *Foster v. Dravo Corp.*, 420 U.S. 92 (1975), this Court held that the "seniority" protected upon a veteran's exercise of his reinstatement rights did not extend to a claim for lost vacation benefits under the applicable collective bargaining agreement. Where an employment benefit "constitutes a bona fide effort to compensate for work actually performed," *id.* at 99, as opposed to length of service, this Court held that there is no statutory protection.

The principle reflected in *Foster* has been consistently followed by the courts. *See Aiello v. Detroit Free Press, Inc.*, 570 F.2d 145 (6th Cir. 1978); *Lipani v. Bohack Corp.*, 546 F.2d 487 (2nd Cir. 1976); *Austin v. Sears, Roebuck and Co.*, 504 F.2d 1033 (9th Cir. 1974). As this Court again summarized the principle in *Alabama Power Co. v. Davis*, "if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of §9." 431 U.S. at 589.

Yet lost compensation for services is precisely what the government would have the Act extended to in this case. The gravamen of its complaint is that Monroe did not work a 40-hour week, and was accordingly not paid for a 40-hour week, because of conflicts between his regular work schedule and reserve obligations. It is not clear whether the government is asking this Court to approve the district court's actual award of pay to Monroe for time not worked. *Compare* Pet. 9 n. 6 *with* Brief for Respondent at 23 and Pet. App. 25a, 26a. Nevertheless, it is clear that the remedy the government seeks is one intended to compensate for

the loss of pay for time not worked.[12] There is no basis under this Court's precedent for such a remedy.

B. The Remedy Sought Would Override the Scheduling and Schedule Exchange Provisions of the Collective Bargaining Agreement.

The Master Letter Schedule provides a regular and equitable distribution among employees at Lima Refinery of the burdens of shift, weekend and holiday work. There is no provision in the collective bargaining agreement under which an employee can demand a change in the shifts he is assigned under the Master Letter Schedule. Nor is the Refinery free to juggle the Schedule at its whim. Rather, the agreement provides that any employee who is unable or unwilling to work his regular assigned shift may exercise the right to exchange shifts with another qualified employee who is willing to do so. *See* J.A. 25. The record does not indicate that Sohio ever impeded Monroe in his exercise of this right. On those occasions when he was unable to arrange a swap to avoid a schedule conflict, the apparent cause was the unwillingness of his qualified fellow employees to voluntarily exchange shifts.

The relief sought would override this provision of the collective bargaining agreement. Any employee-reservist would be entitled to demand, as a matter of statutory right, that his regular schedule be altered for any week that he was scheduled for weekend duty in conflict with a reserve obligation. The necessary result in this case would be that, involuntarily, his fellow employees would be required

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12. For example, no relief was sought relating to Monroe's absences for two-week summer camps during the period in question, apparently because Monroe was paid for this two-week period in accordance with Sohio's military leave policy. *See* J.A. 27. As the Office of Veterans Reemployment Rights has noted, many employers make such payments voluntarily. *Veterans Reemployment Rights Handbook*, p. 21, *supra*, at 113, 118.

to work more weekend shifts at straight-time pay than they would under the existing equitable allocation of weekend duty. The provision for voluntary exchanges under the agreement would be rendered a nullity, since the employee-reservist would be able to exercise this statutory right without regard to whether he had first made attempts to arrange for a voluntary transfer.

To disturb the scheduling practices established under the collective bargaining agreement in this manner would ignore this Court's traditional deference to such voluntary resolutions of everyday workplace problems. As this Court recently noted, discussing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. It does not behoove a court to second-guess either that process or its products. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. *California Brewers Association v. Bryant*, 100 S. Ct. 814, 820 (1980) (citations omitted).

Compare Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949). The same deference to "this Nation's long standing labor policy" applies with equal force to the interpretation of §2021(b)(3), enacted four years later in 1968.

This case thus presents a radically different issue from that presented in *West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980). In *West*, the employee-reservist's claim

was based upon the assertion that he had been denied a right expressly provided by the collective bargaining agreement, *i.e.*, a *guaranteed* 40-hour week. The relief sought was, in effect, an order that the employer live up to the express guarantee it had given in the collective bargaining agreement. In this case, there is no such guarantee.[13] The voluntary exchange provisions of Article V, paragraph 23 provide an employee's sole recourse under the agreement when he is unable to work his regularly scheduled hours. The government in this case, unlike *West*, thus seeks a right that has no basis in the collective bargaining agreement.

C. Any Obligation to Accommodate Beyond Granting a Leave of Absence Is Fully Satisfied by Permitting Voluntary Exchange of Shift Assignments.

The government's brief suggests that §2021(b)(3) imposes upon employers an obligation to make accommodations beyond those required by §2024(d) in the face of conflicts between an employee-reservist's regular work schedule and military obligations. *See* Brief for Respondent at 23, 24.[14] Section 2024(d), of course, already requires extensive accommodation of such conflicts, and Sohio contends that it has no duty to make further ac-

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13. Article IV, paragraph 5 of the agreement between Lima Refinery and OCAW Local 7-624 states: "This Article defines the normal hours of work and shall not be construed as a guarantee of hours of work per day or per week or of days of work per week."

The existence and applicability of the agreement was stipulated by the parties in the district court, and the language of certain provisions is cited in the record. *See* J.A. 25, 26. Respondent requests that this Court take judicial notice of the actual language of the provision of the agreement cited above. Such notice is appropriate under Rule 201, sections (b)(2) and (f), Federal Rules of Evidence. Fed. R. Evid. 201(b)(2), (f).

14. The lower court authority cited by the government does not support such a proposition. *Carlson v. New Hampshire*

(Continued on following page)

commodation. Even if there were any such obligation, it is clear under *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), that the provisions of the collective bargaining agreement permitting voluntary exchanges of shift assignments fully met its requirements.

In *Hardison,* this Court upheld the discharge of an employee whose religious tenets precluded him from working his regular Saturday work schedule. The applicable statutory standard required the employer to demonstrate that "he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *See* 42 U.S.C. §2000e(j). The employer in *Hardison* assigned weekend work on an involuntary basis. Similarly, at Lima Refinery, the Master Letter Schedule allocates weekend work on an involuntary basis. This Court rejected the suggestion that an employer was required to override its existing system for allocating the burden of weekend work in the face of a statutory command to "reasonably accommodate":

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed upon seniority system must

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Footnote continued—
Dep't of Safety, 609 F.2d 1024 (1st Cir. 1979), *cert. denied,* 446 U.S. 913 (1980), in fact, specifically noted that a duty to accommodate schedules would exist, if at all, only "in truly exceptional circumstances," 609 F.2d at 1027 n. 6. In *West v. Safeway Stores, Inc.,* 609 F.2d 147 (5th Cir. 1980), the court's conclusion was not based upon a statutory duty to accommodate but upon the finding that the applicable collective bargaining agreement guaranteed 40 hours of work per week to employees.

> give way when necessary to accommodate religious observances.
>
> . . . .
>
> . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. 432 U.S. at 79-81.

These principles apply with equal force in this case. The specific language of §2024(d) already spells out an accommodation requirement which recognizes an employer's interest in maintaining its regular work schedule. The Master Letter Schedule procedure utilized at Lima Refinery constitutes the customary method at this workplace for making an equitable allocation of undesirable work shifts (holidays, weekends, second and third shifts). If an employee-reservist is able to avoid his regular weekend shift assignments, then one of his fellow employees must work that weekend as a regular shift instead. As a result, his fellow employees will involuntarily work more than their fair share of weekends.

The government suggested at an earlier stage in this proceeding that some form of "payback" scheme could be developed to balance out weekend assignments. *See* J.A. 41-43. Such a payback scheme is, in fact, not possible. The scheme proposed by the government would not even fit the absences of record in this case. For example, it would not accommodate the three consecutive weekends of absence in January 1977 (nor any other absences that were not predictable a year in advance). It would also result in several instances where an employee

would work "back-to-back", *i.e.*, work a third shift on one day and the first shift on the next day, thus working 16 consecutive hours. This would violate the collective bargaining agreement, not to mention common sense safety practices for refinery operations. More significantly, however, any payback scheme would work only if the employee population were static. This is not the case; as changes take place in the workforce through the course of the year, employees advance on the Master Letter Schedule. Finally, the scheme proposed by the government assumed that only one employee-reservist must be accommodated. How could such a scheme be devised when more than one were involved?[15]

The district court in this case was able to distinguish *Hardison* only by suggesting that the statutory protection accorded reserve obligations is superior to the statutory protection accorded religious observances. *See* Pet. App. 24a, 25a. Neither the language nor the legislative history of §2021(b)(3) supports this novel conclusion. *Hardison* must be treated as controlling in this case if any duty to accommodate beyond what is already required by §2024(d) is held to exist. Just as the employer in *Hardison* met this duty by offering to implement a shift exchange scheme, Lima Refinery met any such duty by actually negotiating shift exchange rights as part of the collective bargaining agreement.

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15. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 84 n. 15, noting "the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays."

IV. ANY ARGUMENTS FOR ESTABLISHING NEW EMPLOYMENT RIGHTS FOR RESERVISTS SHOULD BE ADDRESSED TO CONGRESS.

A. Proper Application of Current Statutory Provisions Adequately Resolves Conflicts Between Weekend Work Assignments and Reserve Obligations.

The work schedule problems confronted by employee-reservists are adequately addressed by proper application of existing provisions of the statute. Under §2024(d), the right to a leave of absence is established, provided the employee-reservist subsequently reports to work in accordance with his regular work schedule. To the extent any employment benefits may be denied because of military absences, the provisions of §2024(d) calling for reinstatement with "seniority" preserved provide a basis for determining whether such benefits should be accorded. The Sixth Circuit so held in this case. Pet. App. 8a.

The analysis of the district court in *Breeding v. TRW, Inc., Ross Gear Division,* 477 F. Supp. 1177 (M.D. Tenn. 1979), *appeal docketed,* No. 79-1629 (6th Cir. 1979), demonstrates the proper analysis of such claims for foregone compensation or benefits. The district court noted:

> [S]uch rights as the right to work overtime, the right to work a forty-hour week, or the right to paid vacations are contingent benefits of employment which must be earned and should be distinguished from employment benefits based on mere presence at work. 477 F. Supp. at 1182.

The court in *Breeding* focused upon the question of whether a bona fide work requirement existed which justi-

fied denial of the benefit sought to an absent employee-reservist. This is the correct inquiry. The concept of "seniority" under §2024(d), as amplified by this Court's decisions relating to comparable protections for the regular military, is fully adequate for resolving the issues typically presented, such as claims for holiday pay, *Kidder v. Eastern Air Lines, Inc.*, 469 F. Supp. 1060 (S.D. Fla. 1978), or for overtime equalization rights, *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *Lott v. Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975).

The error made by the court in *Breeding*, and by other courts which have considered claims for employment benefits on behalf of absent employee-reservists, including both lower courts in this case, is the mistake of reviewing such claims under §2021(b)(3) at all. Section 2021(b)(3) was not intended as a vehicle for such affirmative claims for benefits; on the contrary, it was solely intended as a basis for asserting claims of discriminatory treatment.

In applying §2021(b)(3) to affirmative claims for benefits, the courts are assuming the impossible task of deciding what the nebulous term "incident or advantage of employment" means, a task more fitted for metaphysicians than judges. These are not common terms in the parlance of employee relations, unlike the terms "seniority" or "discrimination." There is no guiding reference in the statute or legislative history to their meaning. While the district court in this case had "no trouble here holding that being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment for the plaintiff," by what standard did it make that judgment? *Compare* Pet. App. 24a *with West v. Safeway Stores, Inc.*, 604 F.2d at 150. What of the practice of scheduling employees for two days off per

week? Are two days off per week an "incident or advantage of employment"? If an employee-reservist is rescheduled to lose his two days off (*i.e.*, by bridging his weekly schedule around the weekend reserve obligation, as the government seeks here), is he thus denied an "incident or advantage of employment"? This lack of Congressional guidance on how to judge claims for benefits that may be an "incident or advantage of employment" in the routine context of daily worklife is a strong indication that no such application was intended.

B. Petitioner Seeks a New and Unprecedented Statutory Right That Exceeds Any Right Available to the Regular Military.

The thrust of the government's argument is that §2021(b)(3) must be applied by this Court to new areas beyond those contemplated by the Congress that enacted it. The court of appeals recognized that the principal Congressional concern in enacting §2021(b)(3) was employer discrimination against reservists in retention in employment, or the granting of promotions, training, or other significant employment opportunities. Pet. App. 11a. The government suggests that this is not enough because "intentional discrimination against reservists is a problem that is likely to occur only rarely . . ." Brief for Petitioner at 12. This is, in effect, an argument that because most employers comply with the requirements of an existing statutory provision, this Court is obliged to interpret that statutory provision to impose more stringent requirements upon all employers. Both the premise and conclusions of this argument are erroneous.

As the legislative history indicates, the Congress that considered §2021(b)(3) was expressly advised that the practices to which it addressed itself were not common,

but nevertheless needed a legislative remedy. *See House Hearings - 1966* at 5315. Case law to date under §2021(b)(3) indicates that such intentional employer discrimination still exists and that §2021(b)(3) is the sole method available under the statute to address this continuing problem. *See* pp. 32-33, *supra*.

Under the government's theory, an employee-reservist would be the beneficiary of an absolute statutory guarantee that he suffer no adverse economic consequences whatsoever resulting from his occasional training obligations. An employee-reservist could demand that his employer "pay me or trade me" (*i.e.*, guarantee a change in work schedule, regardless of usual practices, or pay for lost work time if juggling the work schedule creates too many problems). Such a guarantee would go far beyond any right accorded the regular military under the statute; as this Court noted in *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 337 U.S. 265, 271 (1958), the law "does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his had he not been called to the colors." There is no indication in the statute or legislative history that Congress intended to prefer the employee-reservist over the veteran of the regular military by providing such a guarantee of perfect reproduction of what might have been.

C. Congress Is the Appropriate Forum to Hear Petitioner's Arguments for Additional Statutory Protection.

This Court has consistently noted the importance of assuring that "important choices of social policy are made by Congress, the branch of our government most responsive to the popular will," *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 100 S. Ct. 2844, 2886

(1980) (Rehnquist, J., concurring). This is particularly important with regard to claims for preferential treatment based upon a protected status, since numerous competing interests must often be balanced in resolving such claims. *See Fullilove v. Klutznick,* 100 S. Ct. 2758 (1980).

Employment protection for veterans is one such area where Congress and state legislatures have traditionally performed this function of balancing the competing interests at stake. The net result has been the creation of a comprehensive set of statutory protections and benefits for veterans and military personnel over the years, including the veterans' reemployment provisions set forth at 38 U.S.C. §§2021-2026. This Court has previously recognized and deferred to the critical role of legislative bodies in determining the appropriate extent of employment protection to be accorded veterans and military personnel. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979).

The government has identified what it claims to be a "pervasive problem" which must be addressed: "the adverse effects of the application of facially neutral rules that reservists suffer in their daily worklife as a result of their military obligations." Brief for Petitioner at 12. If such a widespread problem exists, it would not be a new one; the general pattern of reserve obligations, including required absences from work, has not changed significantly over the years. Congress in 1951, 1960 and again in 1968 specifically addressed the implications of reserve-related absences upon an employee-reservist's employment status, and struck a specific balance today embodied in §2024(d) and §2021(b)(3). The government contends this balance does not go far enough to meet the problems encountered by the employee-reservist. If this is the case, then the proper course would be to approach Congress and

ask it to reconsider the balance it has already struck. To ask that this Court adopt, more than a decade after its passage, an artificial, unprecedented and unsupported interpretation of §2021(b)(3) as an affirmative action measure for employee-reservists is not the proper course.

CONCLUSION

For all of the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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ADDENDUM A

Excerpts From Handbooks and Field Letters Issued by the Office of Veterans' Reemployment Rights, U.S. Department of Labor

1. *Veterans' Reemployment Rights Handbook* (1970)

Chapter XVIII: Reservists and Guardsmen - Tours of Training Duty

A statutory amendment effective August 17, 1968 makes it clear and explicit that a reservist or guardsman cannot be discharged from his employment, or denied any promotion or other employment benefit or advantage, because of any obligation arising out of his membership in the reserves, National Guard, or Air National Guard, or because of his absences from work that result from such obligation. The intent of this provision is to prohibit any kind of discrimination by the employer against an already employed reservist or guardsman which is motivated by his membership in the reserves or Guard or by any consequences of such membership. *Id.* at 114, 115.

EXAMPLES

* * * * *

(9) Horse Trainer H reports back on schedule to his employer, R Racing Stables, from a two-week leave of absence for reserve training duty for which the armed services paid him $100. His normal wages from R Company for the two

weeks would have been $250, so he claims $150 from R Company after reading the provision in the reemployment statute for reinstatement with the "seniority, status, pay, and vacation" the reservist would have had but for his training duty. H had taken his paid vacation for the year in question before going on training duty.

The law does not support his claim. The word "pay," in the provision in question, is construed to mean "rate of pay" in view of the legislative history. If, like many employers, R Company has a voluntary policy of making up the difference in pay in situations like this, then H is entitled to the $150 although the claim is not enforceable as a statutory right. *Id.* at 118.

* * * * *

(12) Employee L is a traveling salesman for UV Cosmetics, Inc., and often spends several days at a time on the road. To fulfill his remaining military obligation, he joins the local reserve unit, which meets every Monday evening. By skillful planning, L is able for several months to avoid conflicts between his job and his reserve meetings, but then the reserve unit changes its meeting time to Wednesday evenings and such conflicts are no longer avoidable. UV Company and L jointly attempt in vain to get L excused from the weekly meetings, and there is no other reserve unit to which he might transfer in the area. UV Company then tells L he must choose between the the reserves and his job with them.

Difficult though it may be, UV Company must work out some plan or schedule that will enable it to live with L's reserve obligation. He is entitled to a leave of absence, including necessary travel time, for each Wednesday evening reserve meeting, and he cannot be dismissed because of the inconvenience this causes the employer. Any attempt to dismiss him ostensibly for other reasons would come under careful scrutiny from the government and the courts because, on the facts stated, there would be evidence that it was only a subterfuge.

(13) Maintenance Man M's reserve unit meets for training duty every Saturday morning. His employer, W Window Company, has a Machine Operator vacancy which it offers M under its policy of always promoting the senior Maintenance Man to such jobs, but since the Machine Operators must often work on Saturdays, it makes the offer conditional on M's getting himself excused from the reserve meetings. M does not wish to jeopardize his status with the reserves, so W Company promotes another employee to the Machine Operator job, and M objects.

Under the August 17, 1968 amendments, W Company must grant M the promotion he clearly would have had but for his reserve obligation, and solve its Saturday staffing problem in some other way. It does not matter whether that obligation was imposed on M by law or voluntarily assumed by him. *Id.* at 119.

2. *Field Letter 23* (1975) (pages unnumbered)

EXAMPLES OF EFFECT OF 1974 AMENDMENTS

* * * * *

(2) Fire Chief Frank Carson of Fenimore City is a Lieutenant Colonel in the Air Force Reserve. To enhance his chances for promotion to full Colonel, he requests a five-month leave of absence beginning May 1, 1975 to attend a military training course of that duration at Randolph Air Force Base, Texas, to which interested reserve officers have been invited. The city refuses to grant the leave on the ground that his services cannot be spared for five months, especially since attendance at the school would be voluntary on his part and the city does not believe it has the authority to grant such leaves. The mayor states that he will have to dismiss Mr. Carson if he leaves his position to attend the school.

Subsection 2024(d) of the Federal reemployment rights law entitles Mr. Carson to the leave requested. However, the Federal statute does not require that the leave must be with pay from the city. Subsection 2021(b)(3) prohibits the city from dismissing him because of his Reserve activities even though his participation in such activities is voluntary. When he returns from the school and reports back to his job promptly, as provided in subsection 2024(d), he will be entitled to reassume the position of Fire Chief with the seniority, status, rate of pay, and vacation that he would have had if his employment had continued without the interruption for attending the Air Force training school.

(3) John Law, a Patrolman on the Traptown police force, is a member of the local National Guard unit which trains for two weeks every summer and one weekend each month. Under Police Department regulations, members of the Guard or Reserves are allowed 15 days off with pay each year for military training duty. The Department allows Patrolman Law time off from his regularly scheduled Saturday work whenever he performs military training on weekends, but requires him to use annual leave for those Saturdays. He object and files a claim with the U.S. Department of Labor.

Under subsections 2024(d) and (f) of the law, the Police Department must permit Law to return to his position after each weekend military training session with the seniority, status, rate of pay and vacation that he would have had if he had not been absent for such training. This means that he cannot be required to use his normal annual leave or vacation time when he goes on either weekend drills or summer encampments with his Guard unit. On the other hand, the law does not require the employer to pay him for any of his military training duty time, although many employers make such payments as a matter of policy.

3. *Field Letter 24* (1978)

EXAMPLES OF EFFECT OF 1974 AMENDMENTS.

Identical to language of Field Letter 23.